The accused should have been charged for an offence under Regulation 31(1)(e) of the *Essential (Community Self-Reliance) Regulations, 1975 and punishable under Regulation 44 of the same Regulations* and not merely under the Emergency (Essential Powers) Ordinance 1969 which vide section 2 confers powers to the Yang di-Pertuan Agong to make the said Regulations.

The accused has therefore pleaded guilty to improper charges.

2. The learned Magistrate has failed to record the facts of the case and to ascertain whether the accused person would admit to the facts had the same been recorded. All that was recorded after the charges were read and explained to the accused who understood the nature of the charge and the consequences of the plea, were "Facts as per charge". Thereafter was the "plea in mitigation" before the sentence. It has been laid down since long ago by the courts that upon a plea of guilty the Magistrate must either take evidence or a statement of the facts and record them. The purpose is to ascertain whether the accused, especially if he is not represented by counsel, in fact understood the charge or charges preferred against him and that he really intended to plead guilty. (See *Supramaniam* v. *Kanthasamy*[1]). If he admits the facts the Magistrate will then be able to accept his plea of guilty and thereafter record his findings.

In *Tukiran bin Taib* v. *Public Prosecutor*,[2] Bellamy J. in a similar case traced the authorities relating to the duty of trial Magistrates on the matter. Firstly, the requirement was laid down by the Court of Appeal as far back as 1932 in *Palan* v. *Public Prosecutor*.[3] Since that case the attention of magistrates has frequently been directed by judges to the importance of observing that practice. (See *Public Prosecutor* v. *Nahat Singh*;[4] *Public Prosecutor* v. *Chean Tin*).[5] Jobling J. in *Chin Ban Keat* v. *Rex*[6] discussed at length the procedure to be adopted. The aim of the court is to record the facts alleged by the prosecuting officer and admitted by the accused in order to satisfy itself that they constitute the offence charged. This can be satisfactorily achieved by a statement from the prosecuting officer followed by an admission by the accused. However, in cases of doubt or difficulty it may be advisable to have evidence led as to the facts. The proper course to be adopted is left to the discretion of the courts.

3. The Magistrate has failed to put on record during the trial a conviction against the accused in all the four charges. That is a mandatory requirement of the Criminal Procedure Code under section 176, which requires that in summary trials before a Magistrate, one of the particulars to be recorded on the charge sheet are the findings, i.e. of conviction or acquittal, as the case may be. Magistrates, even though new, should by now know what his duty is in this connection. I have had, in a recent criminal case, to exercise my revisionary powers in quashing the conviction and setting aside the sentence on a similar mistake made by the same Magistrate, who was later on personally advised by me to get acquainted with the elementary rules of procedure. The charges in the present case are more serious and therefore require proper attention and strict adherence to the procedural code.

I declare the whole trial a nullity and set aside the sentence on all the four charges. The matter is entirely left to the Public Prosecutor to prefer proper charges.

Trial a nullity; sentence set aside.

MAJLIS PERBANDARAN PULAU PINANG v. BOEY SIEW THAN & ORS.

[O.C.J. (Gunn Chit Tuan J.)

December 15, 1977, January 12, 16 and February 9, 1978]
[Penang — Civil Suit No. 692 of 1977]

Practice and Procedure — Public nuisance — Whether local authority can institute action for damages and injunction — Suit not brought in name of Attorney-General or with his consent — R.S.C. 1957, O. 25 r. 3 — Local Government Act, 1976, ss. 2 and 80 — Government Proceedings Ordinance, 1956, s. 8 — Specific Relief Act, 1950, s. 54 (Act 137).

Tort — Public nuisance — Government Proceedings Ordinance, 1956.

The defendants were alleged to have made structural alterations to a building and to have used it as a restaurant without the licence of the local authority. The local authority in this case brought an action for an injunction to restrain the defendants to use the premises as an eating house and for damages for nuisance. It also applied for and obtained a temporary injunction against the defendants. The defendants applied to have the temporary injunction dissolved and also applied for an order that the plaintiff's action be struck out.

Held: (1) if the alleged acts of the defendants amounted to a public nuisance then either the Attorney-General could sue in respect of the public nuisance or his prior consent in writing must have been obtained by two or more persons instituting the suit;

(2) if the plaintiffs succeeded at the trial of the action in proving the facts alleged in the statement of claim there could be no order for damages for nuisance as the acts alleged could, if proved, only amount to a public and not a private nuisance. The claim by the plaintiffs for damages for nuisance was therefore misconceived and unmaintainable;

(3) the plaintiff in this case could not sue the defendants without the prior consent in writing of the Attorney-General;

(4) the action should be dismissed with costs and the temporary injunction dissolved.

Cases referred to:-

(1) *Gouriet* v. *Union of Post Office Workers & Ors.* [1977] 3 All E.R. 70 H.L.

(2) *Soltau* v. *De Held* 2 Sim N.S. 133; 61 E.R. 291 at p. 295.

(3) *Wallasey Local Board* v. *Gracey* (1887) 36 Ch. D. 593.

(4) *Attorney-General* v. *P.Y.A. Quarries Ltd.* [1957] 1 All E.R. 894, 909 C.A.

(5) *Stafford Borough Council* v. *Elkenford Ltd.* [1977] 2 All E.R. 519, 526.

(6) *Warwickshire County Council & Ors.* v. *British Railways Board* [1969] 3 All E.R. 631, 634.

(7) *Prestatyn U.D.C.* v. *Prestatyn Raceway Ltd.* [1969] 3 All E.R. 1573, 1583.

(8) *Tottenham Urban District Council* v. *Williamson and Sons Ltd.* [1896] 2 Q.B. 353 at pp. 354, 355.

(9) *Hampshire C.C.* v. *Shonleigh Nominees Ltd.* [1970] 1 W.L.R. 865.

(10) *Solihull Metropolitan Borough Council* v. *Maxfern Ltd. & Anor.* [1977] 2 All E.R. 177.

(11) *N.W. Rly. Administration* v. *N.W. Rly. Union, Lahore* A.I.R. 1933 Lah. 203.

CIVIL SUIT.

Ghazi Ishak for the plaintiff.

Subash Chandran for the defendants.

Gunn Chit Tuan J.: The defendants by a notice of motion dated December 28, 1977 applied for dissolution of the temporary injunction granted on an *'ex parte'* application on December 15, 1977. They also applied for an order that the plaintiff's action be struck off and for further or other relief and costs of the application. By the said injunction, the defendants were restrained from using, or causing or permitting the holding at No. 42, Jalan Tanjong Tokong, Penang, to be used or kept as an eating house until trial of this action or until further order.

From the pleadings, it is not in dispute that the defendants are and were at all material times in possession and control of the said holding. An application by letter dated September 21, 1977 was received by the plaintiff from the 2nd and 3rd defendants for a licence to operate an eating house at the said holding.

By paragraphs 3, 4, 5, 6, 7 & 8 of the statement of claim, the plaintiff alleged that whilst the said application was being considered it was ascertained that work which amounted to building operations had been carried out at the said holding and that the said holding had been converted to an eating house. Notices were issued by the plaintiff's Building Department requiring the 2nd and 3rd defendants to "stop work of carrying out alterations and additions and conversion of use of premises No. 42, Jalan Tanjong Tokong without the prior approval of the Majlis Perbandaran, Pulau Pinang, to demolish all unauthorised structures and revert the use of the said premises to a dwelling house". It is alleged that the defendants have been using the said holding as an eating house since November 10, 1977 and were in breach of section 144(7) of the Municipal Ordinance, punishable under section 144(9) of the said Ordinance.

It is further alleged that structural works for erecting a building were carried out at the said premises which were originally meant for a dwelling house and such structural works amounted to the erection of a building under the provisions of section 144(11)(e) of the said Municipal Ordinance. The defendants were also in breach of the Municipal by-laws regarding bakeries, eating houses and places where food or drink is sold or prepared or stocked for sale. By-law 27(1) reads as follows: —

"Any person who causes or permits to be used any premises in contravention of by-law 2 shall be guilty of an offence."

And by-law 2(1) is as follows: —

"No person shall keep any aerated water or ice factory, bakery, cook shop or eating house within the limits of the Municipality without a licence thereof issued under this by-law."

It is also alleged that in the meantime there was no control or supervision of the sanitation of the said premises and there were flies and other nuisances such as smoke, smell and indiscriminate disposal of refuse.

The defendants have denied all the above allegations in their pleading and affidavit. They maintained that they were some of the partners of a proposed restaurant business under the firm name or style of "Restaurant Jade Dragon", and that only decorations in the form of a dragon and "moongate" were put in as well as some stores near the sea-well. There were pedestal fans to clear away smell or smoke, and rubbish was put in 44 gallon metal drums with proper metal lids and disposed of every day. They were prepared to subject themselves to any inspection by the plaintiff so as to obtain a licence for their business, but alleged that for reasons best known to itself, the plaintiff was obstructing their business activity. They also pleaded that the plaintiff's statement of claim disclosed no reasonable cause of action and was frivolous, vexatious and embarrassing and was an abuse of the process of court. It was lastly pleaded in the statement of defence that in any event the plaintiff was not entitled to the relief claimed, and the relief claimed could not be granted at the suit of the plaintiff, even if the facts alleged in the statement of claim were established.

In his submission, Mr. Subash Chandran, counsel for the defendants, referred to the statement of claim and pointed out that the plaintiff had claimed not only an injunction to restrain the defendants from using the said holding as an eating house, but also claimed damages for nuisance. He pointed out that there was no allegation to support a claim for damages in the statement of claim and submitted that even if the facts alleged in the statement of claim were established, there could be no order for damages for nuisance as the alleged acts could only amount to a public nuisance and there was no private nuisance in this case. Counsel also pointed out that the plaintiff had no property next to the defendants' holding nor was there any averment in the statement of claim that the plaintiff had a property near or next to the defendants' said holding. Counsel for the defendants also referred to the recent case of *Gouriet* v. *Union of Post Office Workers & Ors.*[1] in which the House of Lords has held, *inter alia*, that public rights could only be asserted in a civil action by the Attorney-General. Except where statute otherwise provided, a private person could only bring an action to restrain a threatened breach of the law if his claim was based on an allegation that the threatened breach would constitute an infringement of his private rights or would inflict special damage on him. Counsel therefore contended that, in any event, this action was not maintainable as it was not brought by the Attorney-General acting ex-officio and representing the public.

On the issue of nuisance, Mr. Ghazi, counsel for the plaintiff, referred to the following definition of "nuisance" in section 2 of the Local Government Act, 1976: —

"'nuisance' means any act, omission or thing occasioning or likely to occasion injury, annoyance, offence, harm, danger or damage to the sense of sight, smell or hearing or which is or is likely to be injurious or dangerous to health or property or which affects the safety or the rights of the inhabitants at large."

He also referred to the following dictum of Kindersley V.C. in the case of *Soltau* v. *De Held:*[2]

"I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance — an injury or a damage, to all persons who come within the sphere of its operation, though it may be so in a greater degree to some than it is to others. For example, take the case of the operations of a manufactory, in the course of which operations volumes of noxious smoke, or of poisonous effluvia, are emitted. To all persons who are at all within the reach of those operations it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that to those who are nearer to it it may be a greater nuisance, a greater inconvenience than it is to those who are more remote from it; but, still, to all who are at all within the reach of it, it is more or less a nuisance or an inconvenience."

Counsel for the plaintiff then submitted that as section 80 of the Local Government Act, 1976, required a local authority to "take steps to remove, put down and abate all nuisances of a public nature within the local authority area on public or private premises and may proceed at law against any person committing any such nuisances for the abatement thereof and for damages", therefore there was no necessity for the plaintiff to obtain the consent of the Attorney-General to proceed by action against the defendants for committing nuisance of a public nature.

With respect, I could not agree with the above contention of plaintiff's counsel and was of the view that although the said section 80 of the Local Government Act, 1976 required a local authority to take necessary steps to remove, put down or abate nuisances of a public nature within its local authority area, such local authority, in my opinion, can only proceed according to law, statutory or otherwise. In other words, a local authority can only "cause any proceedings known to the law to be taken", (per Stirling J. in *Wellasey Local Board* v. *Gracey*[3]). Thus, for example, a local authority is empowered by section 81 of the said Local Government Act to deal with summarily under the said Act certain classes of nuisances listed in paragraphs (a) to (k) of that section which could be called "statutory nuisances". Section 82 of that Act then provides that on receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under the Act, the local authority shall, if satisfied of the existence of a nuisance, serve a notice requiring abatement of nuisance on the person by whose act, default or sufferance the nuisance arose. However, if a local authority for some reason or other decided not to proceed under the said Act against any person committing a nuisance of a public nature, but choose instead to institute a suit for public nuisance, then section 8(1) of the Government Proceedings Ordinance, 1956, which is as follows, clearly applies —

"8 (1). In the case of a public nuisance the Attorney-General, or two or more persons having obtained the consent in writing of the Attorney-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case."

In this case therefore if the alleged acts of the defendants amount to a public nuisance then either the Attorney-General could sue in respect of the public nuisance or his prior consent in writing must have been obtained by two or more persons instituting the suit.

From the words of Kindersley V.C. in the above-quoted case of *Soltau* v. *De Held*[2] it is clear that a nuisance is a public nuisance, if, within its sphere, which is the neighbourhood, it materially affects the reasonable comfort and convenience of a class of the subjects of the State (see *Attorney-General* v. *P.Y.A. Quarries Ltd.*[4]). A private nuisance, however, is one which disturbs the interest of some private individual in the use and enjoyment of his property by interference with the usual enjoyment of property by causing or permitting the escape of deleterious substances or things such as smoke, odours or noise. The difference between a public and a private nuisance is that, in regard to the former, rights which are common to all subjects are infringed. Such rights are unconnected with the possession of or title to immovable property.

In this case, I was in agreement with the contention of counsel for the defendants that if the plaintiffs succeeded at the trial of this action in proving the facts alleged in the statement of claim there could be no order for damages for nuisance as the acts alleged in this case could, if proved, only amount to a public and not a private nuisance. The claim by the plaintiff for damages for nuisance in this suit is therefore misconceived and unmaintainable.

I now turn to the other issue namely the question of whether the temporary injunction granted on December 15, 1977 should be dissolved. Mr. Chandran referred to section 54(k) of the Specific Relief Act, 1950 (Revised — 1974) which provides that an injunction cannot be granted "where the applicant has no personal interest in the matter". He did not elaborate but merely argued that the said provision barred the grant of an injunction to the plaintiff and recognised the English rule as to *locus standi* of members of the public to sue for an injunction to protect the public at large from a wrongful invasion of its rights. He then referred to the case of *Stafford Borough Council* v. *Elkenford Ltd.*[5] where the defendant company in contravention of the U.K. Shops Act, 1950, carried on a large retail market each Sunday on land owned by it. The use of the land for a Sunday market also contravened the Town and Country Planning Act, 1971, since planning permission for that user had been refused by the local authority. The local authority had prosecuted the company successfully in the magistrates' court for breach of the said Shops Act, 1950 and also served an enforcement notice requiring the company to cease Sunday trading in breach of planning control. The said company had appealed to the Divisional Court against its conviction and to the Secretary of State against the enforcement notice but neither appeal had yet been determined. The fines payable under the 1950 Act were unlikely to deter the company from holding the market in view of the profits it was making from the market; and despite the prosecution the company continued to hold the market each Sunday. The local authority then applied to the Chancery Division for an interlocutory injunction to restrain illegal trading on Sundays by the company. The judge granted the injunction claimed on the ground that unless an injunction was granted the company would continue, deliberately and flagrantly, to flout the provisions of the 1950 Act. The company appealed, contending that in the exercise of its discretion the court

should not have granted the injunction because the remedies provided by the 1950 Act had not been exhausted and pursued to finality. It was held by the Court of Appeal that where a company was deliberately organising and maintaining a system which was designed to break the provisions of a statute and was relying for its existence on breaches of the statute, the High Court had a reserve power to enforce the statute, by injunction or declaration, even though the authority responsible for enforcing the statute had not exhausted the possibility of restraining the breaches by the exercise of the remedies provided by the statute.

Mr. Chandran sought to distinguish the above-quoted English decision from the present case by contending that section 71 of the English Shops Act, 1950 is not *in pari materia* with and wider in terms than the provisions of our Local Government Act, 1976. Section 71(1) of the English Shops Act reads as follows: —

"It shall be the duty of every local authority to enforce within their district the provisions of this Act and of the orders made under those provisions, and for that purpose to institute and carry on such proceedings in respect of contraventions of the said provisions and such orders as aforesaid as may be necessary to secure observance thereof."

I agree that the provisions of the said section 71(1) of the English Shops Act, 1950, are different from the provisions of section 80 of our Local Government Act, 1976. But that would not, in my opinion, affect the *ratio decidendi* of the said *Stafford Borough Council's* case which is to the effect that a local authority need not take any other proceedings before making an application to the court for an injunction.

Mr. Ghazi, counsel for the plaintiff, after referring to the said *Stafford Borough Council's* case, stressed the point that that decision showed that the plaintiff in this case need not take any other proceedings before making an application to the court for an injunction. He then referred to the case of *Warwickshire County Council & Ors.* v. *British Railways Board*[6] where it was held, *inter alia*, that section 276 of the U.K. Local Government Act, 1933 gave the plaintiffs a right to act for the protection of the inhabitants of their areas, and there was no necessity for an action on the relation of the Attorney. Section 276 of the said Act reads as follows:

"276. Where a local authority deem it expedient for the promotion or protection of the interests of the inhabitants of their area, they may prosecute or defend any legal proceedings."

Counsel for the plaintiff then referred to and relied on the following dictum of Lord Denning M.R. in that case where His Lordship said: —

"It was suggested that the plaintiff had no right to bring this action; and that the only way in which it could be done would be by an action on the relation of the Attorney-General. Any difficulty on that score has been avoided because we understand that the Attorney-General is ready to give his consent to a relator action. I do not think that there is any need for it. The plaintiffs were perfectly entitled to take these proceedings on behalf of the inhabitants of the area. Section 276 of the Local Government Act 1933 states that where a local authority deem it expedient for the protection of the inhabitants of the area, they may prosecute or defend any legal proceedings. That covers this case."

With respect, I think counsel for the plaintiff was probably not aware of the later case of *Prestatyn U.D.C.* v. *Prestatyn Raceway Ltd.*[7] where Goff J. (as he then was) distinguished the above-quoted dictum of Lord Denning M.R. in the *Warwickshire County Council's* case and relied on the following observations of Kay L.J. in the case of *Tottenham Urban District Council* v. *Williamson & Sons Ltd.*: [8]

"The ordinary law is, that when any one complains of a public nuisance he must obtain the fiat of the Attorney-General for proceedings by way of information, unless he can show that the nuisance of which he complains is the cause of special damage to himself, and so ground for an action. I cannot see that the Public Health Act, 1875, has altered the law in this respect. The section relied on is section 107; but that does not say that a local authority can take proceedings which no private person can take, and which are unknown to the law. Had that been the intention of the Act, I should have expected to find the new remedy, hitherto unknown to the law, stated in explicit terms."

It was held in the above-quoted *Prestatyn's* case that a local authority taking proceedings in respect of a public nuisance under section 276 of the Local Government Act, 1933 was bound to sue on the relation of the Attorney-General, not in its own name. It was also held, *inter alia*, in the case of *Hampshire C.C.* v. *Shonleigh Nominees Ltd.*[9] that, in the absence of explicit words in section 116(5) of the Highways Act, 1959, giving power to a local authority to take proceedings in their name, section 116(2) did not enable them to "assert and protect the rights of the public" to highways in legal proceedings without joining the Attorney-General.

An example of the 'new remedy' which Kay L.J. had in mind in the *Tottenham Urban District Council's* case can be found in section 100 of the U.K. Public Health Act, 1936, which empowers a U.K. local authority to take proceedings in the High Court and which reads as follows: —

"100. If in the case of any statutory nuisance the local authority are of opinion that summary proceedings would afford an inadequate remedy, they may *in their own name* (emphasis is mine) take proceedings in the High Court for the purpose of securing the abatement or prohibition of that nuisance, and such proceedings shall be maintainable notwithstanding that the authority have suffered no damage from the nuisance."

Yet another example would be found in section 222(1) of the U.K. Local Government Act, 1972, which is as follows: —

"Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area — (a) they may prosecute or defend or appear in any legal proceedings and in the case of civil proceedings, may institute them in their own name. . . ."

The above-mentioned section 222(1) of the U.K. Local Government Act, 1972, was, referred to by Oliver J. in the recent case of *Solihull Metropolitan Borough Council* v. *Maxfern Ltd. & Anor.*[10] in which His Lordship held that the express provision in the said section 222(1)(a) of the said U.K. 1972 Act enabled proceedings for the enforcement of public rights which prior to the Act could not have been brought without the Attorney-General's consent, to be brought in the local authority's own name and without the consent of the Attorney-General. There are no such explicit provisions in our Local Government Act, 1976, and, as pointed out above, the provisions of section

8 of the Government Proceedings Ordinance, 1956, are clear and are not, in my view, in any way affected by the provisions of section 80 of the Local Government Act, 1976. It was my judgment therefore that the plaintiff in this case could not sue the defendants without the prior consent in writing of the Attorney-General.

Counsel for the plaintiff, Mr. Ghazi, also referred to section 54(k) of the Specific Relief Act, 1950, and argued that the plaintiff had a personal interest in the matter under section 80 of the Local Government Act, 1976. It was not disputed by either party that no plaintiff can maintain a suit to obtain specific or preventive relief for which he cannot show in himself the *locus standi*. Thus it has been held in the Indian case of *N.W.Ry. Administration v. N.W.Ry. Union, Lahore*[11] that an injunction cannot be granted under the corresponding section 55(k) of the Indian Specific Relief Act, 1877, when the plaintiff had no personal interest in the matter. Although the plaintiff in this case is statutorily required to abate nuisances under section 80 of the Local Government Act, 1976, I could not agree with counsel's contention that that section gave the plaintiff a personal interest in this matter within the meaning of section 54(k) of our Specific Relief Act, 1950. Counsel for the plaintiff's alternative argument was that section 54 of the Specific Relief Act, 1950 was not applicable in this case and if this case was not covered by the said section 54 then an injunction should not be refused. Here again I was of the view that the position is that if the case falls within section 54 of the Specific Relief Act, 1950, then no injunction can be granted. But even if the said section 54 did not apply, then section 52 of the Specific Relief Act, 1950 also applies and the plaintiff would still have to prove the breach of an obligation existing in its favour before it can obtain a permanent injunction or even a temporary injunction. In this case however it has not been shown to me what obligation exists the breach of which entitles the plaintiff to the grant of a perpetual injunction.

In the above-quoted case of *Hampshire C.C.* v. *Shonleigh Nominees Ltd.*,[9] Plowman J. made no order pending an application for fiat of the Attorney-General. He also indicated that if a fiat was given, leave to amend by joining the Attorney-General as a co-plaintiff would be given; but if the fiat was refused the plaintiff's summons would be struck out. In this case, I was of the view that under section 8(1) of our Government Proceedings Ordinance, 1956, either the Attorney-General or two or more persons *having obtained* the consent in writing of the Attorney-General, should have instituted this suit in the first instance. Therefore having considered all the circumstances of this case, I decided to allow this application and ordered this action be dismissed with costs under O.25 r.3 of the Rules of the Supreme Court, 1957, and I also ordered the dissolution of the temporary injunction granted on December 15, 1977 and an inquiry as to damages to be held before the Senior Assistant Registrar, Penang.

Action dismissed.

Solicitors: *Presgrave & Matthews; Jag-Jit Singh & Co.*

THE HONGKONG AND SHANGHAI BANKING CORPORATION v. ISMAIL BIN DAUD & ANOR.

[O.C.J. (Mohamed Zahir J.) March 12, 1977]
[Kota Bharu — Civil Suit No. 146 of 1976]

Practice & Procedure — Judgment in default of appearance — Application to set aside — Plea of good defence — Whether there was a prima facie defence — R.S.C. 1957, O. 13 rr. 3 & 10.

This was a liquidated claim by the plaintiff against the defendants as guarantors under a guarantee. The first defendant sought to set aside the default of appearance judgment of October 25, 1976 made by the Senior Assistant Registrar. He contended that he was served with the writ only on November 14, 1976 and not as alleged by the process server on October 15, 1976. The first defendant also pleaded that he had a good defence to the plaintiff's claim.

Held, dismissing the first defendant's application: (1) there was evidence to show that the first defendant had been served with the writ on October 15, 1976;

(2) in an application of this nature the defendant must produce to the court evidence that he had a *prima facie* defence. The first defendant's application can only be interpreted as merely an attempt to delay repayment.

Case referred to:-

(1) *Evans* v. *Bartlam* [1937] A.C. 480.

CIVIL SUIT.

Yusof bin Haji Mohamed Nor for the first defendant.

Datuk H.L. Wrigglesworth for the plaintiff.

Mohamed Zahir J.: The 1st defendant is applying to set aside the default of appearance judgment dated October 25, 1976 made by the learned Senior Assistant Registrar. The reasons given in his affidavit are as follows:

(a) that he was served with the writ only on November 14, 1976 and not as alleged by the Process Server that it was served on him on October 15, 1976 at Batu 3½ Jalan Pengkalan Chepa, Kota Bharu;

(b) that he has a good defence to the plaintiff's claim. He first filed a proposed defence and some time later filed an amendment thereto.

In his affidavit dated January 22, 1977 the 1st defendant alleged that on October 9, 1976 he was in Singapore and Johore until October 12 and then he returned to Kuala Lumpur and remained in Kuala Lumpur until October 22, 1976 when he returned to Kota Bharu and he exhibited the photostat copy of relevant pages of his diary and endorsement on his passport. The Court Process Server in his affidavit affirmed on October 16, 1976 alleged that on October 15, 1976 he served the writ on 1st defendant at Batu 3½ Jalan Pengkalan Chepa, Kota Bharu and that he (1st defendant) received the writ but he refused to sign acknowledging receipt of the same. The 1st defendant in alleging that he was in Kuala Lumpur at the material time was therefore alleging improper motive and deceit on the part of the Court Process Server. However, the 1st defendant went no further than making the allegation. He had no other proof other than his diary. I read through the contents of the diary and I am not satisfied with the allegations therein. For instance, on the material date, October 15, 1976, the entries in the diary indicate something suspicious in the manner and the wordings they were